

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 1 ADMINISTRATION

CHAPTER 1 RULES OF PRACTICE AND PROCEDURE

Adopting Rules for Contested Case Hearings

Summary

1. Section 131-1-2 of Title 13, Chapter 1, entitled "Definitions" is amended.
2. Subchapter 4 of Title 13, Chapter 1, is amended to read "Declaratory Rulings."
3. Subchapter 5 of Title 13, Chapter 1, providing for "Contested Case Proceedings" is adopted.

"Sec. 13-1-2 Definitions. (a) As used in this title, unless the context requires otherwise:

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the board of land and natural resources.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.

"Department" means the department of land and natural resources.

"Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any court or agency proceeding.

"Person" means as appropriate individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

"Petitioner" means the person or agency on whose behalf the petition or application is made.

"Presiding officer" means the person conducting the hearing which shall be the chairperson or the chairperson's designated representative.

"Proceeding" means the board's consideration of the relevant facts and applicable law, consideration thereof, and action thereupon with respect to a particular subject within the board's jurisdiction, initiated by a filing or submittal or request or a board's notice or order, and shall include but not be limited to:

- (1) Proceeding involving the adoption of forest reserve or watershed boundaries;
- (2) Petitions for the creation of land use sub-zones in conservation districts;
- (3) Proceedings involving the adoption of forest, forest reserve, watershed, fish and game, water, parks, historical sites, recording and land development, use, management, disposal and acquisition rules;
- (4) Petitions or applications for the granting or declaring any right, privilege, authority, or relief under or from any provision of law or of any rule or requirement made pursuant to a power granted by law;
- (5) An investigation or review instituted or requested to be instituted by the board;
- (6) Other proceedings involving the adoption, amendment, or repeal of any rule of the board, whether initiated by board order or notice or by petition of an interested person.

"Public hearing" means a hearing required by law in which members of the public generally may comment upon a proposed rule or application.

"Rules" means the rules of practice and procedure before the board.

"Public records" is defined in section 92-50, Hawaii Revised Statutes. The term shall include all rules, written statements of policy or interpretation formulated, adopted or used by the board, all final opinions and orders, the minutes of meetings of

the board and any other material required by law to be kept on file in the office of the board unless accorded confidential treatment pursuant to statute or the rules of the board."

[Eff. 6/22/81; 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-8, 171-6)

## "Subchapter 4 Declaratory Rulings"

"SUBCHAPTER 5  
CONTESTED CASE PROCEEDINGS

§13-1-28 Contested case hearings. When required by law, the board shall hold a contested case hearing upon its own motion or on the written petition of any government agency or any interested person who is properly admitted as a party pursuant to section 13-1-31. Unless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the board may adopt procedures that in its opinion will best serve the purposes of the hearings. Where a public hearing is required by law, it shall be held prior to the contested case hearing [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9)

§13-1-29 Request for hearing. (a) A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable. The time for making an oral or written request and submitting a written petition may be waived by the board.

(b) A petition requesting a contested case hearing shall contain concise statements of:

- (1) The legal authority under which the proceeding, hearing or action is to be held or made;
- (2) The petitioner's interest that may be affected;
- (3) The disagreement, denial, or grievance which is being contested by the petitioner;
- (4) The basic facts and issues raised; and
- (5) The relief to which the party or petitioner seeks or deems itself entitled.

[Eff. 9/7/82] (Auth: HRS §91-2) (Imp: HRS §91-9)

§13-1-30 Notice of hearing. After a determination is made that a contested case hearing is required, the written notice of hearing shall be served on parties in accordance with section 91-9.5, Hawaii Revised Statutes, and shall be served on all persons or agencies admitted as a party at their last recorded addresses at least fifteen days before the hearing date. Further, the notice shall be published as provided by law but not less than once in a newspaper of general circulation within the State and within the county provided that matters of internal management shall not be subject to the publication requirement.

[Eff. 9/7/82] (Auth: HRS §91-2, 171-6)

(Imp: HRS §§91-9, 91-9.5)

§13-1-31 Parties. (a) The following persons or agencies shall be admitted as a party:

- (1) The petitioner shall be a party.
- (2) All government agencies whose jurisdiction includes the land in question may be admitted as parties upon timely application.
- (3) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.
- (4) Other persons who can show a substantial interest in the matter may apply to be a party. The presiding officer or the board may approve the application only if the applicant's participation will substantially assist the board in its decision making.

(b) The presiding officer or the board as provided by law may deny any application to be a party when it appears that:

- (1) The position of the applicant for participation is substantially the same as the position of a party already admitted to the proceedings; and
- (2) The admission of additional parties will not add substantially new information or the addition will render the proceedings inefficient and unmanageable.

(c) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter by filing a written application with the board not later than ten days before the scheduled contested case hearing. Except for good cause shown, late filings shall not be permitted.

(e) The application to become a party shall contain the following:

- (1) The nature of applicant's statutory or other right.
- (2) The tax map key number of the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.
- (3) The effect of any decision in the proceeding on applicant's interest.
- (4) The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.
- (f) If relevant, the application shall also address:
  - (1) Other means available whereby applicant's interest may be protected.
  - (2) The extent the applicant's interest may be represented by existing parties.
  - (3) The extent the applicant's interest in the proceedings differs from that of the other parties.

- (4) The extent the applicant's participation can assist in development of a complete record.
  - (5) The extent the applicant's participation will broaden the issue or delay the proceeding.
  - (6) How the applicant's intervention would serve the public interest.
  - (7) Any other information the board may add or delete.
  - (g) If any party opposes another person's application to be a party, the party may file objections for the record no later than ten days prior to the hearing.
  - (h) All applications to be a party shall be acted upon as soon as practicable and shall be decided not later than the commencement of the contested case hearing.
  - (i) A person whose petition to be admitted as a party has been denied may appeal that denial to the circuit court pursuant to section 91-14, Hawaii Revised Statutes. [Eff. 9/7/82]
- (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-9.5)

§13-1-32 Conduct of hearing. (a) Contested case hearings shall be conducted in accordance with this subchapter, and chapter 91, HRS.

(b) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing. The board members may examine and cross-examine witnesses.

(c) The chairperson of the board shall be the presiding officer. However, the chairperson may designate another board member, an appointed representative or a master to be presiding officer unless prohibited by law.

(d) The board may conduct the hearing or, unless otherwise prohibited by law, the board in its discretion may designate a hearing officer or master to conduct contested case hearings.

(e) The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript.

(f) In hearings on applications, petitions, complaints, and violations, the petitioner or complainant shall make the first opening statement and the last closing argument unless the board directs otherwise. Other parties shall be heard in such order as the presiding officer directs. After all parties close their case, the department may make its recommendations, if any.

(g) Where a party is represented by more than one counsel, they may allocate witnesses between them but only one of the counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.

(h) Each party shall have the right to conduct such cross-examinations of the witnesses as may be required for a full and true disclosure of the relevant facts and shall have the right to submit rebuttal evidence, subject to limitation by the presiding officer.

(i) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross-examination or the time for testimony upon a particular issue, subject to law. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9, 92-16)

(j) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9(d))

§13-1-33 Procedure for witnesses. (a) Witnesses may be subpoenaed as set forth below:

- (1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the board shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena.
- (2) Request for the issuance of subpoenas for the production of documents or records shall be in writing, shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena duces tecum.

(b) Subpoenas may be issued by the presiding officer. No subpoena shall be issued unless the party requesting the subpoena has complied with this section giving the name and address of the desired witness and tendering the proper witness and mileage fees. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. Requests for subpoenas shall be filed not later than three days before the scheduled hearing.

(c) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii and such fees and mileage shall be paid by the party at whose request the witness appears. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §92-16)

§13-1-34 Motions. (a) All motions other than those made during a hearing shall be made in writing to the board, shall state the relief sought, and shall be accompanied by an affidavit of memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for all motions and opposing memorandum, if any.

(b) The moving party shall serve a copy of all motions on all other parties at least forty-eight hours prior to the hearing on the motion and shall file with the board the original with proof of service.

(c) A memorandum in opposition or a counter affidavit shall be served on all parties not later than twenty-four hours prior to the hearing. The original and proof of service shall be filed with the board.

(d) Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing shall be deemed a waiver of objection to the granting or denial of the motion.  
[Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HS §91-7)

§13-1-35 Evidence. (a) The presiding officer may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view to doing substantial justice.

(b) The presiding officer shall rule on the admissibility of all evidence. The rulings may be reviewed by the board in determining the matter on its merits.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval of the presiding officer, a witness may read testimony into the record on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer and all counsel parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the presiding officer five days before the hearing or if such prior service is waived, to permit proper cross examination of the witnesses on matters contained in the prepared testimony.

(f) If relevant and material matter is offered in evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other matter in the document would burden the record, at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies of it received as an exhibit. Other parties shall be afforded opportunity at the time to examine the document, and to offer in evidence other portions believed material and relevant.

(g) Exhibits shall be prepared as follows:

(1) Documents, pleadings, correspondence and other exhibits shall be legible and must be prepared on paper either 8-1/2x13 inches or 8-1/2x11 inches in size. Charts and other oversize exhibits must be bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.

(2) When exhibits are offered in evidence, the original and eight copies, unless otherwise waived by the board, shall be furnished to the presiding officer for the board's use with adequate copies for review by other parties, unless the copies have been previously furnished or the presiding officer directs otherwise.

(h) If any matter contained in a document on file as a public record with the department is offered in evidence, unless

directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(i) Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(j) At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6)  
(Imp: HRS §§91-9, 91-10)

§13-1-36 Pre-hearing conferences; exchange of exhibits; briefs. (a) The presiding officer may hold or cause to be held pre-hearing conferences with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.

(b) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6)  
(Imp: HRS §91-9)

§13-1-37 Correction of transcript. Motions to correct the transcript shall be made within five days after receipt of the transcript and shall be acted upon by the presiding officer.  
[Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-10)

§13-1-38 Disqualification. No board member shall sit in any proceeding in which the member has any pecuniary or business interest involved in the proceeding or who is related within the first degree by blood or marriage to any party to the proceeding.

If, after declaring any pecuniary interest or consanguinity to the parties, the parties do not oppose the member from sitting in a proceeding, the record shall note clearly the waiver by the parties. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§84-14, 91-13, 171-4)

§13-1-39 Ex parte (single party) communications. (a) No party or person petitioning to be a party to a proceeding before the board nor their employees, representatives or agents shall make an unauthorized ex parte communication either oral or written concerning the contested case to any member of the board who will be a participant in the decision-making process.

(b) The following classes of ex parte communications are permitted.

- (1) Those which relate solely too matters which a board member is authorized by the board to dispose of on ex parte basis.
  - (2) Requests for information with respect to the status of a proceeding.
  - (3) Those which all parties to the proceeding agree or which the board has formally ruled may be made on an ex parte basis.
  - (4) Those with representatives of any news media on matters intended to inform the general public
- [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-13)

§13-1-40 Decisions and orders. (a) A proceeding shall be deemed submitted for decision by the board after the taking of evidence, the filing of briefs, the consideration of motions, and the presentation of oral argument as may have been permitted or prescribed by the presiding officer. Where a hearing officer has conducted the hearing, the hearing officer shall file a report with the evidence, or a summary thereof, as well as proposed findings of facts and conclusions of law which the board may adopt, reject or modify. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposals shall be filed with the board and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.

(b) Within the time established by law, if any, or within a reasonable time after the hearing, the board shall render its findings of fact, conclusions of law and decision and order approving the proposal, denying the proposal, or modifying the proposal by imposing conditions. The vote of each member shall be recorded. Upon agreement by the parties, the examination and proposed decision provisions under section 91-11, HRS, may be waived pursuant to section 91-9(d), HRS.

(c) Every decision and order adverse to a party to the proceeding, rendered by the board in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its decision a ruling upon each proposed findings so presented.

(d) Decisions and orders shall be served by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be affected by personal delivery of a certified copy. When a party to an application proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party.

[Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-12)

§13-1-41 Reconsideration. (a) The board may reconsider a decision it has made on the merits only if the moving party can show:

(1) New information not previously available would affect the result; or

(2) That a substantial injustice would occur.

(b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier. [Eff. 9/7/82] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-11, 91-12)

§13-1-42 Appeals. Parties to proceedings who are aggrieved by the decision of the board may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the board if such finding appears to be contrary to the clear preponderance of the evidence. [Eff. 9/7/82]  
(Auth: HRS §§91-2, 91-14) (Imp: HRS §§91-14, 91-15)"

DEPARTMENT OF LAND AND NATURAL RESOURCES

The rules amending section 13-1-2 entitled "Definitions" and adopting subchapter 4 entitled "Contested Case Hearings", both of Title 13, Chapter 1, Rules of Practice and Procedure before the Board of Land and Natural Resources on the Summary Page dated August 27, 1982, were adopted on August 27, 1982, by the Board of Land and Natural Resources following public hearings on August 5, 1982, after public notice was given in the Honolulu Star-Bulletin, Honolulu Advertiser, Garden Island News, Hawaii Tribune Herald and the Maui News on July 16, 1982.

These rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

          /s/  Susumo Ono            
Chairperson and Member  
Board of Land and  
Natural Resources

          /s/  Douglas Ing            
Member  
Board of Land and  
Natural Resources

APPROVED AS TO FORM:

          /s/  William Tam            
Deputy Attorney General

          /s/  George Ariyoshi            
Governor

          August 27, 1982            
Date Filed